Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

No. 94-1216

In The Supreme Court of the United States

OCTOBER TERM, 1994

J. CHARLES F. GILLE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PLAINTIFF'S REPLY TO BRIEF IN OPPOSITION

J. CHARLES F. GILLE, *pro se*
1700 W. Quantico Street
Broken Arrow, Okla. 74011
(918) 455-5968

APRIL 1995

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

ARGUMENT 2

1. Gille effectively gave the IRS sufficient notice of his new address, as evidenced by the IRS collecting over $5,000 from the new address as a result of a change of address Gille filed with the post office. 2

2. Awareness of a move does not prevent the IRS from sending notice to the correct address. 3

3. Notice may be sufficient though never received, but only if truly sent to the last known address. . 4

4. The factual issue of diligence was determined in Petitioner's favor. 5

5. When the IRS issued the notice of deficiency, it was already aware that the Gilles had moved, and had the new address in its computer. 5

6. Availability of post-payment suit for refund does not justify deprivation of pre-payment privilege. . 6

7. This Court may instruct the court of appeals to remand. 7

8. A holding on the last known address for the notice of deficiency does not foreclose challenges regarding the last known address for other notices. 7

9. The argument regarding other grounds considered by a lower court applies more to Gille than to the Government. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Guillen v. Barnes, 819 F.2d 975 (10th Cir.1987) 5

Holof v. Commissioner, 872 F.2d 50 (3rd Cir. 1989) . . . 5

King v. Commissioner, 857 F.2d 676 (9th Cir.1988) . . . 4

Shapiro v. Secretary of State, 499 F.2d 527 (162 U.S.App.D.C. 391)(1975) 8

No. 94-1216

In The Supreme Court of the United States

OCTOBER TERM, 1994

J. CHARLES F. GILLE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PLAINTIFF'S REPLY TO BRIEF IN OPPOSITION

STATEMENT

The brief in opposition raises for the first time the following arguments:

1) Petitioner totally failed to advise the IRS of his new addresses (Opp. 8).

2) The IRS must be allowed to send its notices without regard to whether they will be received (Opp. 8).

3) Notice is sufficient even if never received (Opp. 9).

4) The issue of diligence with regard to the last known address is not open to further review (Opp. 9).

5) Information acquired after the notice of deficiency is sent does not affect validity of the notice (Opp. 10).

6) Access to Tax Court is not a right, since an unlawful collection can be challenged in District Court after paying the taxes (Opp. 11).

7) Remand cannot be suggested now since it was not requested earlier (Opp. 12).

8) The holding of the court of appeals the last known address for the notice of deficiency settled the issue of last known address for all notices (Opp. 12).

9) Even if it decided wrongly on the last known address, the court of appeals could also have reversed on the grounds that the IRS acted in good faith (Opp. 6,7).

Not one of these arguments has merit. We will address each in turn.

ARGUMENT

1. Gille effectively gave the IRS sufficient notice of his new address, as evidenced by the IRS collecting over $5,000 from the new address as a result of a change of address Gille filed with the post office.

The address used by the IRS for the last known address in this case was the address on the Gilles' joint return for 1982. However, prior to any of the activity at issue in this case, the address for that return had already been established with the IRS as the Gilles' new address in Oklahoma, and

the IRS had collected an additional $5,131.10 from this address in regard to this 1982 joint return.

Pursuant to a change of address the Gilles filed with the postal service, a notice of deficiency for this 1982 return was forwarded to the Gilles' new address in Oklahoma in January, 1985 (Pet.App. B.1). As a result of correspondence between this address and the IRS, regarding this joint return, the IRS collected the deficiency plus penalties and interest ($4,982.48 at Pet.App. B.2, plus $139.62 paid on 7/11/85 and $9 paid on 10/23/85).

The Gilles were convinced that the address for the joint return had thus been established with the IRS as the address in Oklahoma. Obviously, the IRS knew where they now lived. After all the correspondence to and from the IRS at this address, what possible reason could there be for Gille to send them further notice of a change of address? However, the IRS recorded the change of address for Mrs. Gille only. Though it was she who happened to handle this set of correspondence, the IRS was never given notice — "clear and concise" or otherwise — that the Gilles were ever divorced or separated. Indeed they are still living together, as always. Surely the IRS was entitled to rely on the information provided by Petitioner that he was married, absent clear and concise notice to the contrary. Reliance on that information, and on the fact that mail addressed to Gille had been forwarded to this address, made it unmistakable that this was Gille's address.

2. Awareness of a move does not prevent the IRS from sending notice to the correct address.

In response to Gille's assertion that the holding in this case improperly permits the IRS to ignore clear evidence

that a taxpayer has moved, the Government urges, "The fact that the IRS is aware that a taxpayer has moved does not disable it from providing the notice required by the statute" (Opp. 8).

The Government seems to admit that the IRS must use reasonable diligence to ascertain a taxpayer's address (Opp. 6,9). However, the admission is rendered meaningless by the Government's insistence that the use of the word "known" in the term "last *known* address" excuses the IRS from concerning itself with anything but the address on the taxpayer's own most recent return, or an explicit notice of the new address which the taxpayer himself has provided (Opp. 8-9).

The Government insists that even if the IRS has perfect knowledge of the correct address, it is entitled to ignore that knowledge *unless* that knowledge came directly from the taxpayer in the proper form. However, the Government has not notified the citizens that they must formally notify the IRS of a change of address even when the IRS obviously already knows their new address. The Government insists that this deprivation of notice of deficiency, without notice of what they must do to prevent the deprivation, is due process. Wrong.

3. Notice may be sufficient though never received, but only if truly sent to the last known address.

The brief in opposition asserts that actual notice is not required and that a notice mailed to the last known address is sufficient even if it is never received (Opp. 7-9). The principal authority for this assertion, cited four times and quoted twice, is dicta. The court in *King v. Commissioner*, 857 F.2d 676 (9th Cir.1988), did not hold that a notice was

sufficient though not received. It held that the notice was not sent to the last known address, and was therefore invalid.

The other authority is not of general applicability. In *Guillen v. Barnes*, 819 F.2d 975 (10th Cir.1987), the court held that Darlene Guillen had given false information to the IRS, including a false social security number and two false addresses, and that *under the facts and circumstances*, her failure to receive the notice was her own fault and could not be held to be the fault of the IRS.

The IRS itself has successfully argued that, unless the taxpayer receives actual notice of the deficiency in time to petition Tax Court, a notice of deficiency mailed to the wrong address and returned to the IRS undelivered is null and void. *Holof v. Commissioner*, 872 F.2d 50 (3rd Cir. 1989).

4. The factual issue of diligence was determined in Petitioner's favor.

The opposition brief states that the issue of diligence, in determining the address for the notice of deficiency, is a factual question that does not warrant further review (Opp. 9). This implies that the petition seeks to question this diligence. However, the petition does not question the diligence, since the trier of fact determined that the IRS failed to exercise reasonable diligence (Pet.App. B.12).

5. When the IRS issued the notice of deficiency, it was already aware that the Gilles had moved, and had the new address in its computer.

The opposition brief argues forcefully that in determining the last known address for the notice of

deficiency, information acquired after the notice was sent is not relevant (Opp. 10). This argument overlooks the facts that 1) the IRS was aware of the move prior to issuing the notice of deficiency, and 2) the IRS had the new address in its computer long before it issued the notice.

The IRS claims as the last known address the address on the Gilles' joint return for 1982. In addition to all the correspondence to the new address in Oklahoma regarding this joint return for 1982, preliminary notices to the old Utah address had been returned to the IRS undeliverable, which also put the IRS on notice that the Gilles had moved from Utah (Pet.App. B.5). In the course of collecting a deficiency on the 1982 joint return, the IRS had recorded the Gilles' correct address in its computer in 1985, over two years before it issued the notice of deficiency (Argument 1 above). The entities for the first two disclosures were taken from a computer report which plainly showed the Gilles' then-current address (Pet.App. B.5,B.6). This report just as easily could have been generated prior to issuing the notice of deficiency.

6. Availability of post-payment suit for refund does not justify deprivation of pre-payment privilege.

The petition's third reason for granting the writ, involving denial of access to Tax Court, is dismissed by a mere comment in a final footnote in the opposition brief (Opp. 11 n.7). The government dismisses the reason as insignificant, arguing that there is an alternate remedy through a post-payment suit for refund. This argument is irrelevant 1) since it fails to address the due-process provision for a pre-payment remedy, and 2) since the proposed remedy is financially unavailable to Gille.

7. This Court may instruct the court of appeals to remand.

The opposition brief argues that Gille failed to contend in the court of appeals that the court of appeals should remand rather than reverse, and that this failure prevents him from contending for remand now (Opp. 12, n. 7). This argument overlooks the obvious fact that Gille could not have known that the court of appeals would reverse without remanding for determination of other issues plainly before the trial court.

8. A holding on the last known address for the notice of deficiency does not foreclose challenges regarding the last known address for other notices.

The same final footnote in the opposition brief asserts that the holding of the court of appeals regarding the last known address for the notice of deficiency settles the issue of last known address for all notices (Opp. 12). This new argument is specious, as it ignores the statutes (Pet. 24).

All authorities agree that "due process" means notice and opportunity to be heard. The statute states that a notice of deficiency sent to the last known address may be considered sufficient though never received, specifically when "such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence." § 6212(b)(1). The statute is ambiguous regarding any other situation (as recognized by at least one court that Petitioner has read but needs more time to locate).

One reason a notice of deficiency might be allowed even though not received is that no deprivation of property is authorized without further notices to the taxpayer, including a notice of assessment, and then a notice of intent

to levy. Due process clearly prevents deprivation of property when the IRS is aware that no actual notice has been given or received. *Crowd Management Services v. United States*, 792 F.Supp. 87 (D.Or. 1992) (assessment invalid if notice not received within 60 days); *Shapiro v. Secretary of State*, 499 F.2d 527, 531 n.12 (162 U.S.App.D.C. 391)(1975) *aff'd on other grounds*, 424 U.S. 614 (1976) ("The power to levy is inoperative until the subsequent 'failure or refusal' of the taxpayer to pay the required amount.").

9. The argument regarding other grounds considered by a lower court applies more to Gille than to the Government.

The opposition brief makes much of its claim that there were "additional arguments advanced by the government as independent grounds for reversing the decision of the district court" (Opp. 6 n. 3, 7, 11).

This argument is effectively an assertion that the holding of a lower court should not be disturbed without considering all of the issues that were before that lower court. Bingo. This is precisely why the court of appeals was in violation of the rules of appellate procedure, as claimed in the petition, when it reversed the holding of the district court without remanding for determination of the other issues raised in the lower court.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

J. Charles F. Gille, *pro se*
1700 W. Quantico St.
Broken Arrow, Okla. 74011
(918) 455-5968

April 1995